has been the subject of litigation in many states, with conflicting results.

As to the supposedly adequate state grounds for the decision below, the assertion is unfounded in the record and contradicted by the State's own position taken in the courts below.

The State's attempt to raise the specter of delay in public works construction has all the earmarks of the proverbial "straw man". States other than California require notice and hearing before dispossession with no ill effects on their construction programs. Moreover, Appellants have not and do not oppose the right of the State to take possession of land before trial. (See Jurisdictional Statement, p. 7, footnote 5.) Appellants' contention is that such taking of possession must be accompanied by the safeguards inherent in the concept of procedural due process of law. Appellants contend that the minimum which such safeguards require, includes jurisdiction, notice and hearing *before* a court can make an order substantially affecting Appellants' rights in their own land.

The State's suggestion that noticed motions for an Order of Possession would cause "inestimable burdens" and delays, even when viewed in a light favorable to the State, seeks to sacrifice the citizen's right to procedural due process on an altar of expediency.

However, in the factual context of the instant case the State's suggestion cannot possibly be made in good faith, for the following reason. The State secured an order for possession *ex parte* on March 11, 1966. [R. 25.] As drafted by the State, the order allowed possession not earlier than August 1, 1966. [R. 25.] Thus, the State drew and obtained its order so as to provide

3½ months' lead time. In California a motion can be heard on only 10 days' notice, and even that time can be shortened by a court. (Part II, Title XIV, Chap. 1, §1005, California Code of Civil Procedure.) Thus, in the context of the case at bench, this Court is being asked by the State to believe that 10 days is a more burdensome delay than 3½ months.

To allow the State to secure dispossession orders *ex parte* is to sanction abuses. An order for possession obtained without the affected property owner's knowledge can and has in the hands of overzealous or unscrupulous right-of-way agents become a negotiating weapon used with devastating effect on individual condemnees. The State armed with its *ex parte* order can say to the condemnee—"Play ball with us and we will delay serving the Order for Possession. But if you don't, we will have you out of here in 20 days."

The individual confronted with such a power play cannot even seek protection of California courts, as the California statute denies to courts any discretion as to time of possession, except to *reduce* such time at the condemnor's request.

The Federal Question Presented Is of Far-Reaching Importance.

The current extensive program of highway construction, coupled with an explosive growth of state and local governments, has brought about a great increase in the frequency with which eminent domain is used to secure land for burgeoning public works programs. Additionally, the country is increasingly becoming urbanized, with the result that urban-surburban population

centers, the areas in which more public facilities are needed, are also the areas where population density is highest. The inevitable consequence is that the exercise of eminent domain strikes greater numbers of persons with increasing frequency.

The result has been a groundswell of eminent domain litigation, unprecedented in history. For example, during the past fiscal year, 4226 eminent domain cases were filed in the Los Angeles County Superior Court. (Judicial Council of California, *Annual Report of the Administrative Office of the California Courts,* Fiscal Year 1965-1966—this Report is now in the process of publication.) Each eminent domain case is filed against many parcels of land and many owners. Appellants' counsel frequently defend eminent domain cases with as many as 30 or 50 defendants. Thus, tens of thousands of persons annually feel the impact of eminent domain in Los Angeles County alone. A great majority of such cases are takings for rights-of-way, and involve orders of immediate possession.

One consequence of this floodtide of eminent domain litigation has been a controversy over the manner in which a condemnor may take possession of land before trial on the issue of just compensation. Thus, statutes such as the one challenged herein, purporting to allow the taking of possession by means of *ex parte* court orders have increasingly been drawn into litigation.

Such statutes have been repeatedly struck down for their denial of procedural due process to the property owners. *State ex rel. Eastvold v. Yelle* (1955), 46 Wash. 2d 166, 279 P. 2d 645; *Yellowstone Pipeline Co. v. Drummond* (1955), 77 Idaho 36, 287 P. 2d

288; *State v. Phares* (1963), 245 La. 534, 159 So. 2d 144.

In other states, the immediate possession statutes have been upheld, but such statutes require noticed adversary hearings *before* the order for possession can be issued. *Department of Public Works v. Butler Co.* (1958), 13 Ill. 2d 537; 150 N.E. 2d 124, (see [S.H.A.] Illinois Annotated Statutes, Chap. 47, §2.2); *Desert Waters Inc. v. Superior Court* (1962), 91 Ariz. 163, 370 P. 2d 652; (see Arizona Revised Statutes, Title 12, Chap. 8, §12-1116, subdiv. B).

The entire area of initial condemnor-condemnee confrontation is one susceptible to abuses. *United States v. 6,576.27 Acres etc.*, 77 Fed. Supp. 244, 247. It is a time in which the property owner, often not certain of his property's worth, looks to his government for a fair price, but instead finds himself a defendant in a lawsuit. Not surprisingly, there have been so many abuses in this area that the Federal Government, felt it had to step in, and has issued regulations[1] which order the states to make their best offers to prospective condemnees in writing, and to deposit at least 75% of the estimated award[2] before taking possession, on pain of withholding federal-aid highway funds to offending states. Of course, such regulations, commendable though they are insofar as they go, do nothing to insure *judicial* procedural due process to individual prop-

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[1]U.S. Department of Commerce, Bureau of Public Roads, Instructional Memorandum 21-9-65, dated September 13, 1965, and instructional Memorandum 21-14-65, dated November 30, 1965.

[2]Please note that a 75% deposit has been held to be constitutionally inadequate. *Pittsburgh R. Co. v. Port of Allegheny County Authority* (1964), 415 Pa. 177 [202 A. 2d 816].

erty owners, such as Appellants herein. To secure their right to due process in judicial proceedings, Appellants must turn to this Court, since California courts have denied them relief.

Lack of Jurisdiction, Notice and Hearing at the Time of Issuance of a Court Order Cannot Be Cured by Giving Notice That the Order Is About to Be Executed.

The State advances a curious theory that an Order for Immediate Possession operates in two "phases"—first, it is obtained, and then executed. And it is only in the execution phase—argues the State—that jurisdiction need exist and notice need be given.

The State's suggestion is untenable for the reason that not only orders for immediate possession, but all orders and judgments of a court operate in such "two phase" manner.

A judgment, like an order, must be first obtained; only then can it be executed. Thus, if there were any validity to the State's theory, one could go into a court, file a lawsuit, obtain an *ex parte* judgment without service, notice or hearing, and then give notice to the hapless defendant that a judgment against him has been obtained and will be executed in so many days. Thereupon, it would be incumbent upon the defendant to assert his rights by moving the court to vacate the judgment. Such a procedure, is manifestly repugnant to the concept of procedural due process.

It should be noted, however, that while the State's suggestion plainly lacks merit, it is not new—it has been struck down by this Court before. The Court's most recent rejection of an identical legal argument in a

different factual context occurred only last year in *Armstrong v. Manzo,* 380 U.S. 545. In the light of this Court's clear and unequivocal language in *Armstrong* (380 U.S. at 550-551), Appellants respectfully submit that the State's "second phase notice" theory is misconceived.

Likewise, the State's assertion (State's Br. p. 8) that there was no argument below as to substantive merits and therefore "the problems of which appellants speak are moot," is both a *non sequitur* and erroneous. In *Coe v. Armour Fertilizer Works,* 237 U.S. 413, this Court in rejecting a similar argument held at page 424:

> "But, it is said, plaintiff in error . . . in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions as to which his liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he had not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

Likewise *Griffin v. Griffin,* 327 U.S. 220 at 230-231, and *Armstrong v. Manzo,* 380 U.S. 545 at 551.

The point was concisely stated in *United States v. Claudy* (1953, C.A. 3d), 204 F. 2d 624, at 627:

> "Even in civil cases where a personal judgment has been entered without according the defendant rea-

sonable notice and opportunity to be heard, the State may not dilute the requirements of due process by requiring the defendant hereafter to show as a condition precedent to the vacating of the judgment that he has a substantial defense. [Citing *Coe* and *Griffin*]. Thus, regardless of the merits, the establishment of the essential issues in a civil or criminal case must be after reasonable notice and an opportunity to be heard if the procedure is to meet the standard of due process."

To sum up, at the time the Order for Immediate Possession herein was issued, the Appellee court lacked jurisdiction over Appellants—*this is admitted.* [See R. 94.] Moreover, pursuant to the terms of the statute challenged herein as unconstitutional (Part III, Title VII, §1243.5, California Code of Civil Procedure), there was no notice to Appellants, either actual or constructive. There was not even an attempt made to serve Appellants, either personally or by substituted service, with either Summons and Complaint or notice of the State's application of an Order for Possession. There was no service of any kind until *after* the State had its *ex parte* order to waive in Appellants' face. None of the essentials of due process of law were observed, although admittedly Appellants are local residents whose address was known by the State, and whom the State contacted before commencing its action. [See R. 150, lines 8-12.]

In the end, the State's argument boils down to the following. The State says it can go into a court unbeknownst to a property owner, file a lawsuit against him, and then without any service of process or other notice, secure *ex parte* a court order allowing the State

to permanently dispossess a land owner without further adjudication. The State argues it can then confront the property owner, hand him a copy of the Order for Possession and say: "Be off your land in *three* days."[3] This—says the State—is compliance with the constitutional mandate of procedural due process.

Appellants respectfully ask the Court—is it?

Contrary to the State's Assertions, There Is No Appeal in California From an Order of Immediate Possession — the State's Own Citations of Authority Confirm This.

The State asserts (State's Br. p. 7), that Appellants' earlier statements *re* lack of opportunity to appeal an Order of Immediate Possession are "incorrect". To support its assertion the State cites at page 8 of its Brief three opinions.

But what the State has failed to tell this Court is that *none* of the State's cases was an appeal. Each was an extraordinary writ proceeding which is not an appeal.[4] *O. T. Johnson v. Superior Court,* 103 Cal. App. 2d 278, 299 P. 2d 849 was a certiorari proceeding.

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[3]Subdivision (c) of the Statute challenged herein (Part III, Title VII, §1243.5, California Code of Civil Procedure) allows the State to shorten the 20-day period between the service of the Order for Immediate Possession and actual dispossession of the owner to only 3 days, again *ex parte,* and before the owner is served with *any* court process.

[4]In the footnote at p. 2 of the State's Brief, it is sought to be suggested with the aid of two vintage California cases that a respondent court in an extraordinary writ proceeding is as passive as a court whose decision is being appealed. In fact, not only can courts appear in such proceedings (*e.g., Morales v. Superior Court* [1966], 239 Cal. App. 2d 947), but on occasion they even litigate against one another (*Superior Court v. District Court of Appeal* [1966], 65 Cal. 2d ...., Advance Sheet citation; 65 A.C. 293 [419 P. 2d 183].)

Sierra Madre v. Superior Court, 191 Cal. App. 2d 587, and *Eden Memorial Park v. Superior Court,* 189 Cal. App. 2d 421 involved writs of prohibition.

An extraordinary writ proceeding in California is a *discretionary* exercise of a higher court's jurisdiction. Part III, Title 1, Sections 1068 and 1085, California Code of Civil Procedure. Indeed, such writs are also known as prerogative writs, and there is no way to compel a California court to issue one, or even to consider the petition for a writ on the merits.

Thus when a California Superior Court makes an *ex parte* order for immediate possession, the aggrieved property owner has no *right* to have it reviewed; he can only humbly petition a Court of Appeal for a writ which in the appellate court's discretion may or may not be considered on the merits.

Of course, seeking a hearing in the California Supreme Court to review the decision of a District Court of Appeal which has denied an extraordinary writ, is always addressed to the State Supreme Court's discretion. Article VI, Section 4c, California Constitution; Rule 28, California Rules of Court; *People v. Davis* (1905), 147 Cal. 346, 348, 81 Pac. 718. In short, *there is no right to appeal* an Order for Immediate Possession in California. *Central Contra Costa Sanitary District v. Superior Court,* 34 Cal. 2d 845, 848, 215 P. 2d 462; *San Francisco Unified School District v. Hong Mow,* 123 Cal. App. 2d 668, 672, 267 P. 2d 27.

Unlike Similar Federal Legislation, the Statute Challenged Herein Provides No Judicial Safeguards of Appellants' Rights.

The State makes no attempt to defend the fundamental fairness of the statute challenged herein and instead argues that the Federal Declaration of Taking Act. (Title 40, U.S.C., §258a) is even worse than the California statute. Therefore — argues the State — the California statute should be upheld.

The State's argument is both a *non sequitur* and a non-issue. The Federal Declaration of Taking Act is not before this Court.[5] California Code of Civil Procedure Section 1243.5 is.

In any event, whatever may be said about the Federal Declaration of Taking Act, there is no question that by its express language it firmly places control of the manner, circumstances, and time of transfer of possession within the sound discretion of a federal trial court. But the California statute challenged herein does not even purport to do that. Under the California statute the state trial court has no discretion to do anything but to fix the amount of deposit (without the owner being able to tell the court what in *his*

[5]In this connection it should be noted that this Court has apparently never approved the constitutionality of Title 40 U.S.C. §258a. One authority on which the State relies (See State's Br. p. 6) *Oakland v. United States,* 124 F. 2d 959, came from a U.S. Court of Appeals which rendered its opinion under the stringent emergency conditions existing during World War II, and expressly based its holding on such emergency (See 124 F. 2d at 964). The State's only other authority, *Hessel v. A. Smith & Co.,* 15 Fed. Supp. 953, a U.S. District Court opinion, expressly indicates that the property owner therein was afforded notice and hearing (15 Fed. Supp. at 955) and moreover the possession proceedings were expressly held open so as to permit the trial court to make further orders as necessary (15 Fed. Supp. at 954).

view is an adequate deposit), and to give the condemnor whatever the condemnor asks. Please contrast that with the federal procedure, in the light of *United States v. Certain Land in Borough of Manhattan,* 332 F. 2d 679.

Part III, Title VII, Section 1243.5, California Code of Civil Procedure requires neither service of process, nor notice, nor hearing before a state court issues its Order for Possession. It denies the condemnee an opportunity to be heard as to the amount of deposit until after the fact. Under such statute the state court lacks any discretion as to time or manner in which the transfer of possession is to take place. Moreover, the order is not subject to appeal. In all of the above ways Section 1243.5, California Code of Civil Procedure fails to meet the standards of fairness which *are* present in Title 40, United States Code, Section 258a—it is therefore not only *less* protective of an owner's rights than its federal counterpart, but in stark contrast displays its disregard of procedural due process.

There Are No Adequate State Grounds to Sustain the Decision Below — None Were Relied on by the State Courts.

Inasmuch as the State admits at the very outset of its brief (p. 2) that the Appellants' attack on the order for immediate possession in the lower courts was based *solely* on lack of jurisdiction and lack of due process [R. 30, 42], it is difficult to understand how the State can assert the presence of adequate state grounds. Surely, if the lower court lacked jurisdiction, then its acts, whether purportedly based on state law or not, were a nullity. It is basic that an act by a court lacking

jurisdiction, substantially affecting the rights of a person not before the court, is a denial of due process of law. *Pennoyer v. Neff* (U.S.), 5 Otto 714; *Wuchter v. Pizutti,* 276 U.S. 14 at 21; *Griffin v. Griffin,* 327 U.S. 220 at 231.

Manifestly, no "state grounds" can create jurisdiction where none exists by reason of failure to serve *in any manner* the person whose rights the court purports to affect by its ruling. *Armstrong v. Manzo,* 380 U.S. 545 at 550. It would appear that the State's assertion of adequate state grounds is merely a disingenous attempt to somehow force the instant case within the limits of this Court's Rule 16.

The lack of any adequate state grounds can be best seen from the record. No such grounds were urged below by the State, nor relied on by the state courts.[6] In opposing Appellants' Petition for Extraordinary Writ in the California District Court of Appeal, the State expressly argued that no personal jurisdiction over Appellants was necessary [R. 94], and joined issue squarely on whether or not the procedure herein satisfied due process requirements. [R. 97.]

Likewise, in opposing Appellants' Petition for Hearing in the California Supreme Court, the State addressed itself to the questions of due process requirements of notice and hearing. [R. 145.]

The State's assertion of "adequate non-federal basis" supposedly arising from the conclusion that the order of possession herein was not "effective" until service thereof, and was subject to a motion to vacate, bears a striking similarity to the argument pressed unsuccess-

[6]Failure of state courts to pass on the federal issue does not oust the U.S. Supreme Court of jurisdiction. *Lawrence v. State Tax Commission,* 286 U.S. 276 at 281-283.

fully upon this Court in *Griffin v. Griffin,* 327 U.S. 220. In the light of the comprehensive discussion and rejection of such argument in *Griffin,* 327 U.S. at 230-232 and in *Armstrong,* 380 U.S. at 551, Appellants refrain from arguing at length the lack of merit of the State's assertion.

In short, the State's claim of adequate state grounds is a belated, insubstantial attempt to conjure up some kind of basis for the decision below.

Conclusion.

A great problem of our era is the adjustment of the relationship between government and the governed. This brief deals with one important facet of that relationship. The noting of probable jurisdiction herein and the reversal of the decision below, will do more than merely provide Appellants with due process of law. Such action by this Court will settle the law on a constitutional question of widespread importance. Such action will also serve to inhibit the erosion of the rights of an individual at odds with the State.

A meaningful right to due process of law is particularly important where one of the litigants is the State, with all of its power and resources which are brought to bear upon the State's individual adversary. As this Court's decisions relating to due process rights of criminal defendants have made clear, an individual today needs judicial protection in his confrontations with the government. The due process guarantee of the Constitution is the fountainhead of that protection.

An eminent domain lawsuit is an awesome exercise of the State's naked power. It has been aptly said

that in terms of an individual being subordinated to governmental interest, eminent domain is second only in its impact to military conscription. It deprives a man of his home or business, it disrupts individual lives, plans and hopes, and is often a great hardship. Like the power of military conscription, it is justified upon the grounds that the good of the State requires it.

But unlike the power of military conscription, the exercise of eminent domain does not involve a fight for the nation's survival. A road widening does not usually involve a vital national interest.

> "There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard." *Walker v. Hutchinson City,* 352 U.S. 112, 117.

And as in any other litigation, whether civil or criminal, the citizen is entitled as a matter of right to procedural due process.[7]

What "due process" means has been the subject of many judicial opinions and learned dissertations by writers. But one thing is certain, due process of law cannot, under any circumstances, in a judicial proceeding be reduced to a process wherein a court purports to sit and make orders substantially and permanently affecting a litigant's rights, without jurisdiction over that litigant, without notice that the court is about to act in that litigant's case, and without an opportunity to be

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[7]It should be noted that a defendant in an eminent domain action, unlike a defendant in most other actions, civil or criminal, is admittedly not guilty of any wrongdoing. Surely, such an innocent defendant should be entitled to as punctilious an observance of the fairness standards inherent in the concept of due process of law, as other defendants.

heard *before* the court takes such action. *Armstrong v. Manzo, supra.*

The State's suggestion herein, that a court may thus act *in absentia,* with the aggrieved person reduced to a motion to vacate the order as the sole means of protecting his rights, is a manifest violation of the most rudimentary notion of due process. The right to a hearing has little worth unless one is informed that proceedings against him have been instituted. *Schroeder v. City of New York,* 371 U.S. 208, 212.

The problem brought before this Court is a serious and troublesome one. It has been the subject of much litigation in many states. The result has been, that what constitutes due process of law when a state sets out to dispossess a property owner varies from state to state. Before possession may be taken of his land in an eminent domain proceeding, a citizen of Washington or Idaho is entitled by express judicial holding to notice and to a hearing before a court possessed of jurisdiction. The same rights accrue to a citizen of Illinois or Arizona by statute. But as California courts construe due process, a citizen of California is denied these rudiments.[8] And yet, they are all citizens of the United States, all entitled to the protection of the Fourteenth Amendment to the U.S. Constitution, which guarantees due process of law in like measure to all.

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[8]The anomaly of the present status of due process guarantees available to Californians is highlighted by the fact that the State may not order a man's telephone disconnected without *prior* notice and hearing (*Sokol v. Public Utilities Commission* (1966), 65 Cal. 2d ...., Advance Sheet citation: 65 A.C. 241). But, under the statute challenged herein, the State *can without notice or hearing* bulldoze a man's home into the ground on only three day's warning!

Appellants respectfully submit that the federal question presented herein is substantial and of ever-widening importance. Appellants respectfully urge this Court that it deny the State's Motion to Dismiss, and hear this appeal.

Respectfully submitted,

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